SO ORDERED.

SIGNED this 28 day of October, 2004.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re: **DEBORAH ANN GILLIAM,** **DEBTOR.**	**CASE NO. 02-24491-13** **CHAPTER 13**
DEBORAH ANN GILLIAM, **PLAINTIFF,** **v.** **BANK OF AMERICA MORTGAGE, L.L.C.,** **DEFENDANT,** **and** **KANSAS STATE BANK,** **INTERVENOR.**	**ADV. NO. 03-6053**

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This proceeding is before the Court on opposing motions for summary judgment. The plaintiff-debtor appears by counsel Jonathan C. Becker. Defendant Bank of America Mortgage, L.L.C. ("BA"), appears by counsel Robert D. Kroeker, Steven M. Leigh, and Beverly M. Patterson. Intervenor Kansas State Bank appears by counsel Patricia A. Reeder. The Court has reviewed the relevant materials and is now ready to rule.

Debtor Gilliam brought this proceeding under § 544(a)(3) of the Bankruptcy Code to try to avoid BA's mortgage on real property she owned and lived in when she filed her Chapter 13 bankruptcy petition. BA mistakenly released its mortgage sometime before Gilliam's bankruptcy filing. In the course of the proceeding, Gilliam has added the assertion that § 522(h) authorizes her to avoid BA's mortgage under § 544(a). Among other things, BA contends the power to avoid liens under § 544(a)(3) belongs to the Chapter 13 trustee, and Gilliam has no standing to use it. As explained below, the Court concludes that Gilliam cannot avoid BA's mortgage under § 522(h) because she voluntarily gave the mortgage to BA, and that she has no standing to bring an avoidance action directly under §544.

FACTS

The Court's resolution of this proceeding is based on the following facts. The parties base other arguments on factual matters that may be in dispute, but the Court's decision makes considering those arguments and resolving those disputes unnecessary.

In 1998, Debtor Gilliam and her then-husband borrowed almost $90,000 from BA's predecessor, granting a mortgage on their home as security. BA's predecessor properly recorded the mortgage with the register of deeds of the county where the home is located. In 2000, the Gilliams gave a second mortgage on the home to Kansas State Bank ("KSB").

In November 2001, the Gilliams tried to pay off their debt to BA with the proceeds of a third-party's personal check. A bank wired BA the amount required to pay off the debt. The Gilliams claim they discovered very shortly that the check was no good, and tried to get BA to send back the wire transfer. Despite any such efforts, BA recorded a release of the mortgage approximately two weeks after the wire transfer. BA must also have returned the funds at some time, because the parties agree that the debt to BA has not been paid, and that the mortgage release was an error. The Gilliams allege they made attempts to make partial monthly payments to BA after the mistaken release, but BA rejected their offers. About twenty-two months after releasing the mortgage, BA apparently tried to record a revocation of the release, but did not because the register of deeds insisted mortgage registration fees would have to be paid, a requirement BA disputed.

In March 2002, Gilliam's husband filed for divorce. On October 24, 2002, the divorce court entered a judgment that awarded the home involved in the BA transaction to Gilliam, free and clear of her husband's claims to it.

On November 29, 2002, Gilliam filed a Chapter 13 bankruptcy petition. She did not claim the property mortgaged to BA as her homestead on her schedule of exemptions, and has never amended that schedule. In a pretrial order, the parties stipulated that this property was Gilliam's homestead; nevertheless, BA argues in its brief that the property is not her homestead. For purposes of this decision, the Court will assume that the property does constitute Gilliam's homestead. In her bankruptcy schedules, Gilliam listed KSB as her only secured creditor, and listed BA among her general unsecured creditors. Other than the amount she owed BA, her general unsecured debts totaled about $6,900. She also owed a priority debt of about $2,000 for taxes on her home.

Along with the petition, Gilliam filed a Chapter 13 plan in which she proposed, in paragraph 13, to file a "Motion[] to Avoid Lien on Homestead against" BA. She also proposed to place two general unsecured debts (about $1,800 total) in a special class as co-signed or nondischargeable debts, and to pay them in full. BA filed a proof of claim, asserting that it was secured, and Gilliam objected, asserting that the mortgage release had rendered the claim unsecured. BA also filed a motion for stay relief to which Gilliam objected.

On February 18, 2003, Gilliam filed an amended Chapter 13 plan. In this plan, paragraph 13 did not mention BA, but instead said Gilliam would sell her homestead, pay off valid liens, taxes, and so forth, and then deliver $10,000 from the sale proceeds to the Chapter 13 trustee to pay claims. The priority tax debt and the special class of nonpriority

debts remained in the plan. Only one of the holders of the special class debts filed a proof of claim, for $1,468.42, and only $3,266.25 in other general unsecured claims were filed.

A buyer for the home was found, and in August 2003, the Court approved a sale free and clear of liens, with the proceeds remaining after paying closing costs to be held in escrow pending resolution of the conflicting claims to them. The sale price was $165,000. The Court has not seen a full accounting of the closing costs, but they included a real estate commission of $11,550, and presumably the priority tax debt of about $2,000, leaving net proceeds of no more than about $151,450. BA's proof of claim showed Gilliam owed it about $94,800, and KSB filed one showing she owed it about $67,000. Consequently, if both claims are enforceable in those amounts against the sale proceeds, nothing will remain for Gilliam to pay into her Chapter 13 plan. If Gilliam succeeds in avoiding BA's mortgage, though, and getting her amended plan confirmed, she will receive about $74,000 from the sale proceeds, and BA will receive most of the money paid to unsecured creditors through her plan.

The same day that she filed her amended plan, Gilliam filed the complaint that commenced this proceeding. Relying on the mistaken mortgage release and the avoiding powers created by § 544(a) of the Bankruptcy Code, she seeks to avoid BA's claimed mortgage on her homestead. In response, BA raised a number of defenses. The parties have now filed opposing motions for summary judgment, along with various replies and responses. Intervenor KSB has also submitted a brief in support of Gilliam's opposition

to BA's motion. Confirmation of Gilliam's plan has been stayed pending resolution of this proceeding.

In her motion for summary judgment, Gilliam argues that BA's mortgage is avoidable under § 544(a)(3) because under Kansas law, a bona fide purchaser could obtain a superior interest in the property as a result of BA's release of the mortgage. In a subsequent pleading, she added an argument that she is authorized by § 522(h) to avoid the lien because the Chapter 13 trustee has not attempted to do so. In its motion, BA argues, among other things, that Gilliam has no standing to avoid its mortgage under § 544(a)(3) because only the trustee is authorized to use that power. As explained below, the Court concludes that Gilliam cannot avoid BA's mortgage under § 522(h) and has no standing to try to avoid it under § 544(a)(3). These conclusions are sufficient to resolve this proceeding, so the Court will not address the other issues that BA has raised.

DISCUSSION

1. Debtor Gilliam cannot avoid BA's mortgage under § 522(h).

Various provisions of Chapter 5 of the Bankruptcy Code expressly confer certain avoiding powers on "the trustee."[1] Chapter 5 applies to cases under Chapter 13 of the Code.[2] Because Chapter 13 debtors clearly do have standing under § 522(h) to use some of those trustee avoiding powers in certain circumstances, the Court will first analyze

[1] *See* 11 U.S.C.A. §§ 544, 545, 547, 548 & 549.

[2] 11 U.S.C.A. § 103(a).

Gilliam's claim that she can avoid BA's mortgage through § 522(h). That section provides:

> The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided the transfer, if —
>
> (1) such transfer is avoidable by the trustee under section 544 . . . ; and
>
> (2) the trustee does not attempt to avoid such transfer.[3]

While this provision expressly authorizes a debtor to use the § 544 powers Gilliam wants to use here, subsection (g)(1) imposes a significant limitation on that use, one that prevents her from using it in this case. Under § 522(g)(1), a debtor may exempt property that a trustee recovers through the exercise of the § 544 powers "if — (A) such transfer was not a voluntary transfer of such property by the debtor." Gilliam recognizes that case law has pointed out this limit on § 522(h),[4] and then, with a reference to BA's state court foreclosure petition, declares, "The attempted transfer was involuntary."[5] But the only transfer that might have resulted from BA's foreclosure petition was the re-perfection of its mortgage. The transfer Gilliam is actually trying to avoid here (and would have to avoid to enhance her homestead exemption) is her original granting of the mortgage to BA, a transfer that was certainly voluntary. Consequently, even if the trustee might be

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[3]11 U.S.C.A. § 522(h).

[4]See, e.g., *Realty Portfolio, Inc., v. Hamilton (In re Hamilton)*, 125 F.3d 292, 297 (5th Cir. 1997).

[5]Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, filed Dec. 22, 2003, at 9th unnumbered page.

able to avoid BA's mortgage under § 544(a)(3), Gilliam cannot avoid it under § 522(g)(1) and (h).

2. Debtor Gilliam has no standing to avoid BA's mortgage under § 544(a)(3).

Before adding her effort to rely on § 522(h), Gilliam contended that she could avoid BA's mortgage under § 544(a)(3), one of the provisions in Chapter 5 of the Bankruptcy Code that establishes avoiding powers. The Chapter 13 trustee has not joined her attack on the mortgage, and she has no agreement allowing her to use any of his avoiding powers. Like the other Chapter 5 avoiding powers, § 544(a)(3) expressly gives the power to avoid certain transfers and obligations to the "trustee." It reads:

> The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by —
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> . . .
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser at the time of the commencement of the case, whether or not such a purchaser exists.[6]

BA argues that a Chapter 13 debtor is not authorized to exercise this trustee power. The only provisions in Chapter 13 that confer any trustee powers on the debtor are §§ 1303 and 1304, and they concern only rights and powers under §§ 363 and 364, not § 544. By contrast, in Chapter 11 and 12 cases, a debtor acting as the debtor in possession is expressly given, with a few exceptions, all the rights, powers, and duties of a trustee

[6] 11 U.S.C.A. § 544(a)(3).

serving in a Chapter 11 case; the exceptions do not include any of the trustee avoiding powers.[7]

As BA points out, most courts considering the question whether Chapter 13 debtors can exercise one of the Chapter 5 trustee avoiding powers have concluded that they cannot, except to the limited extent authorized by § 522(h).[8] This view often relies on the Supreme Court's decision in *Hartford Underwriters Insurance Company v. Union Planters Bank*.[9] There, an insurance company that had provided postpetition coverage to a Chapter 11 debtor sought to surcharge the insurance premiums against a secured creditor's collateral (which included essentially all the debtor's assets) under § 506(c), but the Supreme Court ruled it could not because the provision says nothing about others surcharging collateral, only that the "trustee" may do so.[10] In a passage particularly relevant to the question of Chapter 13 debtor standing to use any of the trustee avoiding powers, the Court said the context of § 506(c) supported the conclusion that Congress intended to give the power to surcharge collateral exclusively to the trustee: "First, a

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[7]*See* 11 U.S.C.A. § 1107(a) & 1203.

[8]*See, e.g., Realty Portfolio, Inc., v. Hamilton (In re Hamilton)*, 125 F.3d 292, 295-98 (5th Cir. 1997) (No standing to exercise § 544(a)(3) avoiding power, except to the limited extent authorized by § 522(h)); *Stangel v. United States (In re Stangel)*, 219 F.3d 498, 500-01 (5th Cir. 2000), *cert. denied* 532 U.S. 910 (2001) (§ 545 avoiding power); *see also In re Binghi*, 299 B.R. 300, 302-03 (Bankr. S.D.N.Y. 2003) (§ 544(a)(3) avoiding power; citing numerous cases ruling against debtor standing to exercise various Chapter 5 avoiding powers); *Carrasco v. Richardson (In re Richardson)*, 311 B.R. 302, 304-06 (Bankr. S.D. Fla. 2004) (§ 544(b) avoiding power).

[9]530 U.S. 1 (2000).

[10]*Id*. at 6-14.

situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity. . . . Second, the fact the sole party named — the trustee — has a unique role in bankruptcy proceedings makes it entirely plausible that Congress would provide a power to him and not to others."[11] In addition, the Court rejected the insurance company's policy argument that others should be able to use § 506(c) because the trustee may sometimes lack incentive to surcharge collateral and a secured creditor might enjoy the benefit of services without paying for them.[12] The Court said limiting the use of § 506(c) to trustees followed "the natural reading of the text," and that achieving a better policy outcome was a job for Congress, not the courts.[13] This Court notes that it has not seen any decision since *Hartford Underwriters* was issued that cited the case but still decided a Chapter 13 debtor could directly exercise the avoiding powers Congress gave to the "trustee" in Chapter 5 of the Bankruptcy Code.

The strength of the Supreme Court's devotion to the plain meaning of the text of the Bankruptcy Code was further illustrated this year in *Lamie v. United States Trustee*.[14] In that case, the Court refused to allow debtors' attorneys (unless hired by the case trustee) to qualify for compensation under § 330(a) of the Code, even though: (1)

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[11] *Id.* at 6-7.

[12] *Id.* at 11-14.

[13] *Id.* at 13-14.

[14] 540 U.S. ___, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004).

debtors' attorneys had qualified for such compensation before the provision was rewritten in 1994; (2) as rewritten, the provision contained obvious grammatical problems that might well have been the result of a scrivener's error; and (3) the legislative history did not express a clear intent to delete debtors' attorneys from the revised provision.[15] The substance of §§ 1303 and 1304 has not changed since the Bankruptcy Reform Act of 1978,[16] and so far as this Court is aware, there was no history under the predecessor to Chapter 13 of debtors using trustee avoiding powers. Thus, faced with what seems to be a stronger argument for reading another party into a provision than Gilliam can make here, the Supreme Court refused to do so.

Most of the cases concluding that Chapter 13 debtors can use the Chapter 5 trustee avoiding powers justified that conclusion in similar ways and were decided well before *Hartford Underwriters* and *Lamie*.[17] As explained in *Freeman v. Eli Lilly Federal Credit Union (In re Freeman)*,[18] the following considerations supported Chapter 13 debtors' use

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[15]*Id*. at ___, 157 L.Ed.2d at 1031-39.

[16]*See* Pub. L. No. 95-598, Title I, § 101, Ch. 13, subch. I, §§ 1303 & 1304, 92 Stat. 2549, 2646 (codified at 11 U.S.C.A. §§ 1303 & 1304).

[17]*See, e.g., Freeman v. Eli Lilly Federal Credit Union (In re Freeman)*, 72 B.R. 850 (Bankr. E.D. Va. 1987); *Ottaviano v. Sorokin & Sorokin, P.C. (In re Ottaviano)*, 68 B.R. 238 (Bankr. D. Conn. 1986); *Einoder v. Mount Greenwood Bank (In re Einoder)*, 55 B.R. 319 (Bankr. N.D. Ill. 1985); *Russo v. Ciavarella (In re Ciavarella)*, 28 B.R. 823 (Bankr. S.D.N.Y. 1983); *In re Hall*, 26 B.R. 10 (Bankr. M.D. Fla. 1982); *see also Federal Nat'l Mortgage Assoc. v. Fitzgerald (In re Fitzgerald)*, 237 B.R. 252, 262 n. 14 (Bankr. D. Conn. 1999) (stating that courts in District of Connecticut had consistently concluded Chapter 13 debtors could use trustee avoiding powers and citing cases; appears opposing party did not question debtor's standing).

[18]72 B.R. 850 (Bankr. E.D. Va. 1987).

of those powers: (1) the legislative history of § 1303 contains a statement that the section does not imply that debtors do not also possess other powers concurrently with trustees; (2) where the trustee does not act, it is reasonable to assume the avoidance powers should be among those Congress referred to in that history as concurrently possessed by Chapter 13 debtors; (3) the practical reality is that Chapter 13 trustees are mostly concerned with administrative matters and have little incentive to pursue avoiding actions; and (4) debtors are the true representatives of the Chapter 13 estate and decide how much money is to be paid to the trustee for distribution to creditors.[19]

This Court does not find these considerations to be sufficient to overcome Congress's failure to expressly give Chapter 13 debtors the right to use the trustee avoiding powers. The legislative history *Freeman* referred to in the first two points noted above reads:

> Section 1303 . . . specifies rights and powers that the debtor has exclusive of the trustees. The section does not imply that the debtor does not also possess other powers concurrently with the trustee. For example, although section [323] is not specified in section 1303, it is certainly intended that the debtor has the power to sue and be sued.[20]

This vague reference to mostly unspecified powers certainly seems a weak foundation on which to base a Chapter 13 debtor's ability to use the extraordinary trustee avoiding powers. The fact Congress explicitly granted most, but not all, trustee rights and powers

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[19] *Id*. at 853-55.

[20] 124 Cong. Rec. H11106 (daily ed. Sept. 28, 1978); 124 Cong. Rec. S17423 (daily ed. Oct. 6, 1978), remarks of Rep. Edwards and Sen. DeConcini).

to Chapter 11 and 12 debtors[21] further undermines the theory that Congress implicitly intended to grant similar rights and powers to Chapter 13 debtors. The one specific power mentioned in this history is far from illuminating. Section 323 provides that the trustee in a bankruptcy case is the representative of the estate and has the capacity to sue and be sued.[22] Because bankruptcy trustees operate in representative capacities created and defined by the Bankruptcy Code (and a few other statutes), their capacity to sue and be sued might not be presumed if Congress had not expressly provided it. On the other hand, only individuals are eligible to be Chapter 13 debtors and, so far as the Court is aware, individuals are always presumed to have the capacity to sue and be sued, except those who are minors or have been determined to have insufficient mental ability. As a result, there would seem to be no need, as there is for trustees, to expressly provide in the Code that such debtors have the capacity to sue and be sued. Further, the history supplies no defining principle that could be applied to determine which trustee rights and powers Congress intended for Chapter 13 debtors to share with the trustee. Should they be as broad as those given to Chapter 11 and 12 debtors? Broader? Narrower? The history suggests no answer to these questions.

As the Supreme Court made clear once again in *Lamie*, it has little desire to rely on legislative history when interpreting the Bankruptcy Code, and would almost certainly

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[21] 11 U.S.C.A. §§ 1107(a) & 1203.

[22] 11 U.S.C.A. § 323(a) & (b).

demand something more clear than § 1303's history to support the view that Congress intended Chapter 13 debtors to have any trustee powers not expressly conferred by the text of the Code. The power to sue and be sued, the one power actually identified, would seem to be the only one that Court might conceivably be willing to imply from the history. Implying a broad range of additional powers would almost certainly exceed the Court's limited willingness to rely on legislative history.

The other two considerations mentioned in *Freeman* are no more convincing than the legislative history. Standing Chapter 13 trustees like the one serving in this case are entitled to a percentage of the money paid through the plans they administer,[23] so Congress might reasonably have thought this would give such a trustee sufficient incentive to pursue avoidance actions in appropriate circumstances, and consequently believed that Chapter 13 debtors would have no need to use the avoiding powers themselves, except as allowed under § 522 to enhance their exemptions. Even if experience has shown such a view to be mistaken, the Supreme Court has made clear its view that Congress, not the courts, must adjust the Code to reflect that experience. And this Court is not convinced that Chapter 13 trustees always decline to pursue avoidance actions. In this case, for example, rather than following a never-sue policy, the trustee might have considered attacking BA's mortgage and decided the costs and risks of litigation were too great and the potential benefits too small to justify it. In addition,

[23] *See* 11 U.S.C.A. § 1326(b)(2) & 28 U.S.C.A. § 586(e)(1)(B).

unlike the *Freeman* court, this Court does not believe that Chapter 13 debtors have a great deal of freedom to decide how much money to pay into their plans; instead, the requirements for plan provisions and the standards the plans must meet to qualify for confirmation largely control how much Chapter 13 debtors must pay.[24] In short, the reasoning of *Freeman* and other older cases allowing Chapter 13 debtors unlimited use of the trustee avoiding powers appear most unlikely to carry much weight with the Supreme Court today.

The Court believes it should also address two more recent decisions that offer different reasons to allow Gilliam's effort to use § 544(a)(3) without first obtaining the trustee's participation. In *Wood v. Mize (In re Wood)*,[25] the court did side with the majority of courts and conclude that Chapter 13 debtors have no standing to assert the trustee avoiding powers.[26] Then, however, the court ruled that the Chapter 13 trustee was an indispensable party who should be added as a party plaintiff to prosecute the action.[27] This Court is uncertain about its authority to take such a step in a suit commenced by a party with no standing,[28] but would decline to exercise it in this case anyway. Under

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[24]*See* 11 U.S.C.A. §§ 1322 & 1325.

[25]301 B.R. 558 (Bankr. W.D. Mo. 2003).

[26]*Id*. at 561-62.

[27]*Id*. at 562.

[28]*See United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 159-64 (1914) (where suit under statute was brought before cause of action accrued, intervention after accrual did not cure premature nature of suit); *see also* 7C, Wright, Miller & Kane, *Fed. Prac. & Pro.: Civil 2d*, § 1917 (1986) (intervention cannot cure jurisdictional defect that would have barred federal court from hearing

Gilliam's approach, if she were allowed to avoid BA's mortgage, about $84,000 from the sale of her home would become available to her through the homestead objection. Although she has proposed to contribute $10,000 from those proceeds to her plan (and without saying so, keep the other $74,000), her amended plan is not yet confirmed, so it would not bind her to pay the $10,000 to the trustee. Even assuming she would go ahead with that proposal, the benefit she offers her unsecured creditors would be minimal. The trustee's 8% fee would be deducted from the $10,000, leaving $9,200 to be distributed through the plan. Her original plan already proposed to pay the priority tax debt and the one filed unsecured debt she wants to place in the special class to be paid in full, so the Court assumes those claims would not affect the distribution of the $10,000. The $9,200 balance, then, would be distributed pro rata among the remaining three unsecured claims: BA's claim for almost $95,000, and claims for $325 and $2,941.25. This means BA would have over 96% of the general unsecured claims under Gilliam's plan, and paying it with money that would otherwise be paid to it anyway cannot be considered a benefit to be obtained from Gilliam's avoidance action. The other two general unsecured claims would receive about $370 as a result of the mortgage avoidance. Even if the Court has the authority to forcibly add the Chapter 13 trustee as a plaintiff, the Court would decline to do so to gain such a small benefit for Gilliam's unsecured creditors.

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original action). These authorities suggest the Chapter 13 trustee would have to bring a separate suit, not intervene in Gilliam's, to try to avoid BA's mortgage. If that is so, it seems questionable for the Court simply to draft the trustee as a party plaintiff.

About a month after the Supreme Court decided *Lamie*, the Ninth Circuit Bankruptcy Appellate Panel charted a new course in *Houston v. Eiler (In re Cohen)*[29] to the conclusion that Chapter 13 debtors can exercise the trustee avoiding powers. The BAP prefaced its analysis by stating that the text of Chapter 13 does not give anyone authority to use the trustee avoiding powers.[30] Then the BAP discussed the decisions that adopt what it called a narrow construction of the Bankruptcy Code, and find no Chapter 13 debtor standing to pursue trustee avoiding actions because there is no explicit statutory authority for it. Preferring instead the "holistic" approach to the Code that the Supreme Court applied in *United Savings Association v. Timbers of Inwood Forest Associates, Limited*,[31] the BAP suggested that a Chapter 13 debtor's right to remain in possession of property of the estate, including interests in property recovered through the trustee avoiding powers, exclusive right to use, sell, or lease property of the estate, subject to court approval, and exclusive right to propose a plan, coupled with a Chapter 13 trustee's lack of a duty to pursue avoiding actions, led to the conclusion that Chapter 13 debtors must have standing to use the trustee avoiding powers.[32] The BAP then gave an example it felt showed that Chapter 13 debtors must have standing to bring such avoidance actions when the trustee does not: if a Chapter 13 debtor has only $30,000 in disposable income

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[29]305 B.R. 886 (9th Cir. B.A.P. 2004).

[30]*Id.* at 893.

[31]484 U.S. 365, 371 (1988).

[32]305 B.R. at 895-97.

to fund a plan but had made a transfer that a trustee could "unquestionably" avoid and recover a net of $100,000, the debtor could not propose a confirmable plan without avoiding the transfer because the best-interest-of-creditors test for plan confirmation requires paying unsecured creditors at least as much as they would receive in a Chapter 7 liquidation.[33] Since the BAP assumed a Chapter 13 debtor could not get a plan confirmed under these circumstances, the BAP declared that it would be "an odd system" that would require a Chapter 13 debtor to depend on the recovery of an avoidable transfer in order to propose a confirmable plan, but not allow the debtor to avoid the transfer when the trustee declined to do so.[34]

While the Ninth Circuit BAP's analysis is inventive, this Court sees a number of problems with it. First, the BAP not only failed to square its analysis with *Hartford Underwriters* or *Lamie*, it did not even cite either case. Second, while Chapter 7 trustees are given a duty that Chapter 13 trustees are not to "collect and reduce to money the property of the estate,"[35] that does not mean Chapter 13 trustees do not have standing to use the Chapter 5 avoiding powers if they want to. Chapter 5 of the Code applies in Chapter 13 cases,[36] and the avoiding powers are all given to the "trustee."[37] The Court

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[33] *Id*. at 897.

[34] *Id*. at 897.

[35] *See* 11 U.S.C.A. § 704(1) & §1302(b)(1).

[36] 11 U.S.C.A. § 103(a).

[37] *See* 11 U.S.C.A. §§ 542, 543, 544, 547, 548 & 549.

believes the difference in Chapter 7 and Chapter 13 trustee duties simply gives Chapter 13 trustees more discretion not to use the avoiding powers; it does not eliminate their standing to use them. Third, the Chapter 13 debtor's rights to possess and use property of the estate — including property recovered through the avoiding powers — and to propose a plan need not be construed to prevent a Chapter 13 trustee from using an avoiding power. Instead, while the debtor would have the right to possess and use any recovery the trustee might obtain, the recovery would also force the debtor to craft a plan that takes the recovered property into account in order to satisfy the standards for obtaining plan confirmation.[38] That is, much like a Chapter 7 trustee, a Chapter 13 debtor would in some way have to devote the recovered property to paying creditors. Finally, to rely on a hypothetical avoidance recovery to prevent confirmation of a Chapter 13 plan on the best-interest-of-creditors ground, an objecting party would have to show that a Chapter 7 trustee would be at least more likely than not to make the recovery, and the Chapter 13 trustee's refusal to seek the recovery would seem to be fairly strong evidence against that showing. In any event, the BAP's hypothetical seems unlikely to occur in practice. If a trustee can "unquestionably" avoid a transfer and recover $100,000 for the estate, the Court does not understand why a Chapter 13 trustee would not exercise his or her power to avoid it. Of course, in reality, an avoidance recovery is rarely certain, and a Chapter 13

[38] *See* 11 U.S.C.A. §§ 1322 & 1325.

trustee must take the costs, risks, and potential benefits of litigation into account when deciding whether to use an avoiding power.

In fact, the debtors and the trustee involved in *Cohen* had tried another approach to resolve the standing problem that the BAP found so troubling: the trustee executed a contract assigning the estate's avoiding powers to the debtors in exchange for their promise to pay any net proceeds to the estate.[39] According to the BAP, this approach failed because they did not obtain the bankruptcy court's approval of their agreement.[40] With court approval, this simple maneuver would solve the debtor standing problem, and also provide both trustee and court protection against the risk that a debtor might try to use the avoiding powers solely for harassment or other improper purposes. Ultimately, this Court does not find *Cohen* any more persuasive than the older cases that concluded Chapter 13 debtors have direct standing to use the Chapter 5 trustee avoiding powers.

3. Even if Debtor Gilliam had standing and BA's mortgage were avoided, Gilliam herself would not be freed from her obligation to satisfy the mortgage.

Even if the Court were to conclude that Gilliam had standing to pursue this avoidance action, she misunderstands the effect of successfully avoiding BA's mortgage. Outside of bankruptcy, BA's mortgage is still enforceable against her, even if it could lose priority to third parties. Under § 551, if avoided, the mortgage would be "preserved

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[39]305 B.R. at 890.

[40]*Id*. at 891.

for the benefit of the estate."[41] So just like a mortgage avoided by a Chapter 7 trustee, the mortgage would remain enforceable against Gilliam.[42] Avoiding the mortgage through § 544 alone cannot enhance Gilliam's homestead exemption. If she could avoid the mortgage through § 522(h), the mortgage could be preserved for her benefit under § 522(i)(2), rather than the estate's benefit under § 551.[43] But, as explained earlier, Gilliam cannot avoid it that way because it was a voluntary transfer. If the mortgage were avoided under § 544 and preserved for the benefit of the estate under § 551, the proceeds of the sale of the homestead would belong to the bankruptcy estate to the extent of the value of the mortgage, which in this case would apparently equal the amount owed to BA (assuming its claim is fully allowed as filed). Nothing about § 544 or § 551 would give Gilliam any personal right to treat the mortgage as if it no longer existed and keep the sale proceeds herself, except to the extent they exceeded the value of BA's and KSB's mortgages. This is the major difference between the trustee avoiding powers and the avoiding powers conferred on debtors in § 522. The trustee avoiding powers free property from transfers or interests for the benefit of the bankruptcy estate and the creditors, not for the benefit of the debtors; as far as the debtors are concerned, the

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[41] 11 U.S.C.A. § 551.

[42] *See Morris v. Vulcan Chemical Credit Union (In re Rubia)*, 257 B.R. 324, 327 (10th Cir. B.A.P.), *aff'd by unpub. op.* 2001 WL 1580933 (10th Cir. 2001); *Morris v. Citifinancial (In re Trible)*, 290 B.R. 838, 844-45 (Bankr. D. Kan. 2003); *Morris v. St. John Nat'l Bank (In re Haberman)*, 2004 WL 2035341, slip op. at 9-11 (Bankr. D. Kan. 2004).

[43] 11 U.S.C.A. § 522(i)(2).

recovered property remains subject to the transfer or interest the trustee avoids. Only the debtor avoiding powers provided by § 522 enable debtors to free property from claims that they would otherwise have to satisfy to keep the property.

CONCLUSION

For these reasons, the Court concludes that Gilliam cannot avoid BA's mortgage on her former home, or the proceeds from its sale. She cannot avoid it under § 522(h) because she voluntarily gave the mortgage to BA, and she cannot avoid it under § 544(a)(3) because she has no standing to use that power directly. Consequently, Gilliam's motion for summary judgment must be denied, and BA's motion for summary judgment must be granted. This ruling renders all the remaining issues raised in this adversary proceeding moot. The Clerk's Office is hereby directed to schedule a status conference in the main case at which the parties should be prepared to discuss Gilliam's Chapter 13 plan, and any disputes that remain about the disposition of the proceeds of the sale of her house. Gilliam will need to amend her plan to take this decision into account.

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